

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6069

8/29

United States Court of Appeals

FOR THE SECOND CIRCUIT

MORAN TOWING & TRANSPORTATION Co., INC. and
TUG JUDY MORAN, her engines, tackle, etc.,

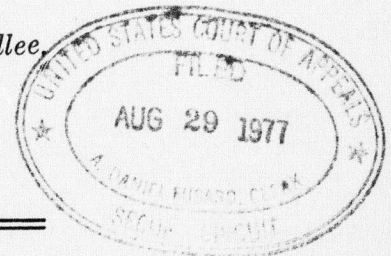
*Defendants and Third-Party
Plaintiffs-Appellants,*

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



**REPLY BRIEF FOR APPELLANTS MORAN TOWING
AND TRANSPORTATION CO., INC. AND
TUG JUDY MORAN**

BURLINGHAM UNDERWOOD & LORD

*Attorneys for Appellants Moran Tow-
ing and Transportation Co., Inc. and
Tug Judy Moran*

One Battery Park Plaza

New York, N.Y. 10004

Tel. No. 422-7585

KENNETH H. VOLK
of Counsel



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO 77-6069

MORAN TOWING & TRANSPORTATION CO.
INC. and TUG JUDY MORAN,
Defendants and Third-Party
Plaintiffs-Appellants

- against -

UNITED STATES OF AMERICA,
Third-Party Defendant-
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS MORAN
TOWING & TRANSPORTATION CO.,
INC. and TUG JUDY MORAN

The Government raises many peripheral, irrelevant issues apparently in an effort to divert this Court's attention from the central issue on this appeal, which is the distance between the easterly edge of the channel and the obstruction which was struck by Barge B. 95. Moran contends that all of the evidence is that the barge struck the pinnacle of rock located about 12 feet outside the channel. There is no evidence that the grounding occurred some 100 feet outside as found by the Lower Court.

For example, the Government argues (Br. p. 16) that it was Moran, not the Coast Guard, which initiated the request that the Army Corp of Engineers conduct a survey of the area. It makes absolutely no difference who requested the survey. The testimony of Wright and Weidman suggests that it was the Coast Guard, but Moran may very well have also requested it. Further, we object to any effort by the Government to enlarge the record by gratuitous offers of documentary evidence not produced at trial, ostensibly in support of this irrelevant issue.

Thus the Government spends considerable time pointing out that Captain Maynard had no Hudson River pilotage endorsement on his unlimited master's license (Br. pp. 22-6). This is another completely irrelevant issue because there is no requirement that he have such an endorsement. The Government stipulated this in open court (Tr. 135):

The Court: I take it you will concede there is no written rule promulgated by any authority that you have a river pilot license.

Mr. Schulmeisters: There is no requirement.

Thus, Captain Maynard was fully qualified to sail up the Hudson River. He had vast experience in the area as the Lower Court recognized (17a)*.

* After describing Maynard's experience, the Lower Court goes on to say: "However, according to the testimony of Captain Sullivan, the Hudson River channel narrows south of Buoy 35 because of a bend in the River and is therefore a poor place for ships to pass." (Emphasis added). The Lower Court is in error here because the channel does not narrow south of Buoy 35, it is substantially wider (See Ex. 6 at E-10 and Govt's Br. p. 7).

The Government attempts to attribute fault to Tug JUDY MORAN because she did not sound a passing whistle signal to the MORANIA 300 (Br. pp. 10 and 25). However, it is inconsequential whether the passing agreement was reached by the exchange of whistle signals, light signals or VHF radio conversations, just so long as the passing was, as the Lower Court accepted, perfectly normal (13a, 16a)*.

The Government argues that Captain Maynard was negligent because he did not personally use the tug's radar (Br. p. 25). There is no evidence at all in support of that statement and the Government cites none. The Lower Court does not even mention radar. Indeed, radar could not have been of any assistance in preventing this casualty because of the very short ranges and distances involved. Furthermore, although Mate Fergeson was attending the radar there was no duty to do so. It was a clear dark night and in such circumstances this Court has held that radar observation is not required. Maroceano Compania Naviera S.A. v. S.S. Verdi, 438 F. 2d. 854, 856 (2 Cir. 1971).

The Government adverts to another grounding involving another Moran tug some nine years earlier, suggesting that there is some connection between the two (Br. pp. 5 and 24). The Government knows full well that the 1965 grounding occurred

* The Lower Court said: "The passing was made port-to-port at about the location of Buoy 35 . . . In addition, the Captain of the MORANIA, Bjorn Roal Eliassen, testified that the flotilla appeared to be in good position."

in an entirely different location about 1/3 of a mile down-river, as shown in the documents annexed to the Government's supplemental answers to interrogatories dated August 16, 1973 (Doc. 27 of the Record on Appeal). Further, according to those documents the rocky ledge upon which the earlier grounding occurred was scheduled to be removed in 1965 and presumably was no longer in existence on October 18, 1973, the time of this casualty.

Finally, the Government argues that the rock pinnacle 12 1/2 feet outside the easterly edge of the channel is not the remains of the Bug Island Light (Br. pp. 17-18). This also is completely irrelevant. Moran does not care what name is put upon the rock pinnacle. In some of the Government's documents (E-13 and E-14) it is called the Bug Island Light. In another, it is called the Stuyvesant Light House or Kinder Hook Upper Light (E-12). It is not what it is called that matters. What matters is that it is not shown on the navigation chart nor was it marked in any way with a warning to navigators, as it now is. The Government feebly argues that the rock pinnacle is shown by the numbers 17 or 19 on the chart (E-10), but this is patently absurd. Because of the very small scale used on the chart the space taken up by the two digits alone is approximately 200 feet, whereas the rock pinnacle as shown on the official Government Survey (Ex. 27 at E-19) is only a few feet wide at its peak of 18.6 feet.

All of the contentions made by the Government as delineated above are purely a smokescreen. Who initiated the survey, whether or not passing signals were sounded, by what name the rock pinnacle is to be denoted, etc. are all completely irrelevant. The essential fact is that the B. 95 struck a pinnacle of rock only 12 1/2 feet outside the easterly edge of the channel.

The Government labors strenuously to support the Lower Court's finding that the point of grounding was about 100 feet outside the channel as shown in the diagram prepared by counsel for the Government and annexed to its Post-Trial Brief (E-28). The point of grounding could not possibly have been as shown on that diagram for the following reasons:

1. All the evidence is to the effect, and the Lower Court found as a fact, that the grounding occurred after the JUDY flotilla had passed Buoy 35. The Lower Court said: "From the evidence produced at trial, it appears that the flotilla had already passed Buoy 35 at the time of the grounding" (15a). The point of grounding as contended by the Government in its diagram is directly opposite Buoy 35. Indeed according to the diagram Tug JUDY MORAN had not even reached Buoy 35.

2. All the evidence is to the effect that the MORANIA 300 and JUDY flotilla passed each other in a normal port-to-port manner prior to the grounding, and that this passing was made at Buoy 35 (13a, 16a). Captain Eliassen of the MORANIA 300 testified (240a):

I proceeded down towards Buoy 35, where we were supposed to change the course after we passed, and at the time I was approximately one hundred feet from Buoy 35. The tug and barge were headed north approximately one hundred fifty feet to the east of me and in the channel as far I could see in a good position . . .

Later upon cross-examination Captain Eliassen testified that the two units were on reciprocal courses and if anything the JUDY "probably as far as I could see was heading a little towards my stern . . . He probably was swinging back because he looked like to me he was coming beautifully." (248a - 249a). This evidence is not at all consistent with the diagram prepared by the Government. If the two units passed with the JUDY flotilla in the position shown by the Government the passing distance was more nearly 350 feet rather than the 150 feet testified to by Captain Eliassen. Further, the two vessels were not on reciprocal courses, or with the JUDY heading slightly toward the stern of the MORANIA 300, as testified to by Captain Eliassen, but on divergent courses with the JUDY heading away from the stern of the MORANIA 300.

3. All of the evidence is to the effect, and the Lower Court so found, that at the time of the grounding the JUDY flotilla was lined up between Beacon 40 ahead and Beacon 32 astern. This puts the JUDY flotilla parallel to the thread of the channel. The Court said (15a):

Captain Maynard testified that before passing the MORANIA the flotilla was proceeding on a straight course of 355°, within a de-

gree, heading for Light 40 on Houghlating Island with Light 32 under its stern.

Then the Court went on to say (17a):

Here there was evidence that prior to the grounding Captain Maynard was taking a bearing on fixed light 40 on Houghlating Island with fixed light 32 under his stern.

A glance at the Government's diagram reveals that the diagram is completely inconsistent with the statements by the Lower Court.

4. The Government's diagram shows that the bow of the Barge B. 95 went outside and to the east of the channel about 900 feet below Buoy 35. There is no evidence of any kind that the flotilla ever left the channel until after passing Buoy 35 and the Government cites none. The Government's contention that Captain Maynard has given three versions of the casualty is pure nonsense. Maynard's one and only version is that the JUDY flotilla was always in the channel. That is what he told the Coast Guard (E-5), that is what he testified on deposition (Ex. E p. 57), and that is what he testified at trial (16a). He was supported in this by an independent witness, Captain Eliassen, whose deposition testimony was unchallenged and accepted by the Lower Court (16a, 240a). Both men obviously thought the JUDY flotilla was in the channel because that is where it should have been had Buoy 35 been on station.

5. The parties stipulated in open court that the damage to the bottom of the B. 95 was on the starboard side

close to the center, straight fore and aft (Tr. 260-1). In other words, the barge did not turn during the grounding but the damage occurred in a straight line throughout the 340 foot length of the barge. Such damage is entirely inconsistent with the grounding as shown on the Government's diagram because (1) since that grounding occurred just about opposite Buoy 35 and since the Government contends that course was altered to 355° at Buoy 35 such an alteration of course would have produced a curved scrape along the bottom of the barge rather than a straight-line damage, (2) had the barge continued in a straight line for its full length at the point shown on the Government's diagram the barge would have struck shallower water at her bow before the stern cleared the 17 foot spot which the Government argues was the place of grounding, and (3) the damage resulting from the grounding as shown on the diagram prepared by the Government would have occurred on the port side, not the starboard side.

Moran repeats that throughout the trial there was never any doubt that the only obstruction claimed by either party to have caused this casualty was the pinnacle of rock located by the Army Corp of Engineers on November 2, 1973 approximately 12 feet to the east of the easterly edge of the channel. The theory of a second obstruction lying further down river some 100 feet outside the channel was first presented to the Court by the Government in its post-trial brief by way of a diagram (E-28). Prior to that time, however, even Government

counsel appeared to concede that the pinnacle of rock did the damage, the only dispute being causation. In addition to the quotation from the trial transcript set forth in our main brief at page 12 we call this Court's attention to the following additional colloquy at the conclusion of trial (230a):

The Court: Well, Captain Maynard's testimony, as I understand it, was that the buoy being off station and he was using that, that pushed him over too far to the east and he hit this obstruction. Is that right?

Mr. Volk: That is essentially the testimony.

The Court: But there is no evidence, he didn't testify that there was any other obstruction. He testified about this one.

Mr. Volk: There was no other obstruction found.

The Court: Sure.

Mr. Volk: I concede that.

The Court: Sure.

Mr. Schulmeisters: By "this obstruction" do you mean the one outside of the channel?

The Court: I don't think there were any others found either inside or outside the channel, as far as I recall the evidence.

Mr. Schulmeisters: I think that is all, your Honor, that I would have.

The Court: You are resting?

Mr. Schulmeisters: The Government rests.

Not only is the Lower Court's finding that the barge grounded 100 feet outside the channel inconsistent with all the evidence, as noted above, it disagrees with the conclusions of

the Coast Guard and the Army Corps of Engineers as to where the grounding occurred.

Herbert S. Wright, Chief of the Survey Branch, Army Corp of Engineers, was convinced that the pinnacle of rock located on November 2, 1973 had caused the damage (281a). He highlighted this in red on the official Army Corp of Engineers Survey Chart prepared from these soundings (287a-288a; E-11).*

On November 15, 1973 the Corp of Engineers sent a copy of the survey chart to the Coast Guard requesting that the Coast Guard "mark the obstruction with a buoy until such time as alignment is established by the channel buoys, if out of position; and consider removal of the obstruction, which is the base of abandoned Coast Guard light previously known as Stuyvesant Light House or Kinder Hook Upper Light, shown on the attached map." (E-12).

On December 13, 1973 the Coast Guard Commander instructed the commanding officer of the Buoy Tender RED BEACH to place a buoy over the obstruction. The first paragraph of that letter states (E-13):

The Corp of Engineers has advised this office of an obstruction in the Upper Hudson River in close proximity to the east side of the channel between Upper Hudson River Lighted Buoy 34 and Upper Hudson River Light

* The circled 17' spot marked "A" on the survey chart (E-11) was done by Government counsel during the deposition of Captain Maynard for the sole purpose of showing that there is such a depth corresponding to the number 17 depicted on the navigation chart (Ex. E, pp. 87-8).

36. Available information indicates the obstruction may be the remains of former Bug Island Light. Due to the nature and location of the obstruction, and the recent receipt of information indicating several accidents in the area, marking is considered necessary.

On December 16, 1973 the RED BEACH placed a new buoy, designated 34A, over the rock pinnacle (Ex. 14A, p. 119) and on December 19, 1973 the Coast Guard issued an Aids to Navigation Operation Request advising of the exact location of Buoy 34A as follows (E-14):

The Army Corp of Engineers has advised this office of an obstruction located near the east side of the channel, which caused several accidents in the past. This buoy is established, on the channel line, to prevent mariners from straying outside the channel and encountering the obstruction. Obstruction believed to be remains of former Bug Island Light which was apparently decommissioned over seventy years ago.

Finally, the Coast Guard, after investigating this casualty itself, concluded that the obstruction involved was the remains of an old U.S. Coast Guard light house located 12 feet outside the channel (E-7).

If, as the Government now contends and as apparently the Lower Court has accepted, the Barge B. 95 grounded at a point approximately 100 feet outside the channel almost opposite Buoy 35 it makes little sense that the warning buoy was not placed over that spot instead of the rock pinnacle located near the channel edge substantially above Buoy 35.

The only conclusion to be drawn from all of the above is that Barge B. 95 struck the rock pinnacle, not the spot now contended by the Government. The decision of the Lower Court should be reversed with instructions to enter judgment in favor of Moran.

Dated: New York, New York

August 29, 1977

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Appellants
Moran Towing & Transportation
Co., Inc. and Tug JUDY MORAN

KENNETH H. VOLK,
Of Counsel

two (2) Service of three (3) copies of the within *REPLY BRIEF*
is admitted this *29th* day of *August* 1977



